**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**LANDMARK LEGAL FOUNDATION**

**Plaintiff,**

**vs.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

**Defendant.**

**Civ. Act. No. 12-1726 (RCL)**

**DEFENDANT'S MOTION FOR LEAVE TO FILE ITS SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S ORAL MOTION FOR CRIMINAL CONTEMPT SANCTIONS**

On January 28, 2015, the Court held a hearing on Plaintiff's motion for spoliation sanctions. During oral argument at the hearing, counsel for Plaintiff, for the very first time, expanded Plaintiff's requested relief to include the imposition of criminal contempt sanctions. *See* Transcript of Motion Hearing (hereafter cited as "Tr.") at 24-25. Plaintiff had never before sought such sanctions in its moving papers so Defendant had no occasion to address this subject in its Opposition Surreply to the Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Spoliation Sanctions. ECF No. 62. Because Plaintiff has proposed new forms of relief from this Court, Defendant, hereby respectfully seeks leave to file this supplemental memorandum specifically addressing Plaintiff's new request. Defendant received the hearing transcript on February 20, 2015, and has filed this supplement as promptly as practicable thereafter. Pursuant to LCvR 7(m), Defendant sought the position of Landmark concerning this Motion. Landmark opposes Defendant's request to file a supplemental memorandum.

For the reasons set forth above, Defendant respectfully requests that this Court grant it leave to file the attached memorandum.

Respectfully submitted,

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For the District of Columbia

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **LANDMARK LEGAL FOUNDATION,** | ) | |
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| **Plaintiff,** | ) | |
| | ) | **Civil Action No. 12-1726 (RCL)** |
| | ) | |
| **v.** | ) | |
| | ) | |
| | ) | |
| **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** | ) | |
| | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S REQUEST FOR CRIMINAL CONTEMPT SANCTIONS**

On January 28, 2015, the Court held a hearing on Plaintiff's motion for spoliation sanctions. During oral argument at the hearing, counsel for Plaintiff, for the very first time, expanded Plaintiff's requested relief to include the imposition of criminal contempt sanctions. *See* Transcript of Motion Hearing (Video Conference) before the Hon. Royce C. Lamberth, United States District Judge (hereafter cited as "Tr.") at 24-25. Plaintiff had never before sought such sanctions in its moving papers so Defendant had no occasion to address this subject in its Opposition. Defendant hereby supplements its Opposition to include the following discussion, which demonstrates that criminal contempt sanctions are unjustified for at least three reasons.[1]

[1] Defendant received the hearing transcript on February 20, 2015, and has filed this supplement as promptly as practicable thereafter.

*First*, as the Court has previously recognized, "notwithstanding the broad powers conferred upon the courts by the contempt statute, 18 U.S.C. section 401, courts have held that it does not qualify as a waiver of sovereign immunity because it contains no explicit, unequivocal language allowing the government to be sued." *Alexander v. FBI*, 541 F. Supp. 2d 274, 300 (D.D.C. 2008); *see* Tr. at 57. Thus, sovereign immunity bars the imposition of criminal contempt sanctions against the Defendant in this action.

*Second*, to the extent Plaintiff's oral request may be deemed directed toward individual EPA employees, the imposition of criminal contempt sanctions could not even be considered unless and until the putative contemnors have been identified and afforded all the due process to which a criminal defendant would otherwise be entitled. "Criminal contempt is a crime in the ordinary sense." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). Consequently, except for the limited circumstances in which summary procedure is appropriate,[2] a criminal contempt sanction may not be imposed "on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Id.* (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)); *accord, Cobell v. Norton*, 334 F.3d 1128, 1147 (D.C. Cir. 2003). Those required protections include, among others: the rights to notice of charges, to assistance of counsel, to present a

[2] Nothing that has occurred in the instant case could conceivably justify resort to the summary criminal contempt procedure here. *See* Fed. R. Crim. P. 42(b). Such summary adjudications are limited to the most extreme situations where the presiding judge can "see and hear the contemptuous behavior and . . . it [is] committed in the actual presence of the court" such that "an ongoing proceeding is disrupted or frustrated and the authority of the court must be immediately asserted to restore order." *United States v. Lee*, 720 F.2d 1049, 1052 (9th Cir. 1983) (citing authorities); *In re James R. Holloway*, 995 F.2d 1080, 1086-87 (D.C. Cir. 1993). Those extreme situations are commonly referred to as "direct contempts" to distinguish them from so-called "indirect contempts" that are subject to Fed. R. Crim. P. 42(a). *See Bagwell*, 512 U.S. at 827 n. 2 (citing authorities). Plaintiff's request for criminal contempt sanctions involves an alleged indirect contempt.

defense, and to proof beyond a reasonable doubt; the privilege against self-incrimination; and the right to trial by jury when appropriate. *Bagwell*, 512 U.S. at 826-27 (citing authorities). None of those required protections have been provided here and, as discussed below, there are no grounds for the imposition of criminal contempt sanctions in any event.

*Third*, if Plaintiff's oral request is treated as a motion to institute a formal prosecution for criminal contempt, the motion should be denied because there are insufficient grounds to warrant that drastic step. The purpose of criminal contempt is to "vindicate the authority of the court" by punishing the contemnor following a transgression, rather than to insure future compliance with a court order or to aid the plaintiff, which is the province of civil contempt. *Cobell*, 334 F.3d at 1145 (citing *Bagwell*, 512 U.S. at 828-29). Nothing in the record of this case indicates that any of Defendant's employees have acted in contempt of the Court's authority.

Plaintiff's request for the imposition of criminal contempt sanctions rests on Plaintiff's claim that EPA employees have attempted to intentionally deceive the Court. "[M]aking false statements to a court constitutes 'misbehavior' that may be punishable as contempt so long as the other elements of the contempt statute [18 U.S.C. § 401(1)] are satisfied." *In re Grand Jury Proceedings*, 117 F. Supp. 2d 6, 27 (D.D.C. 2000) (citing *In re Michael*, 326 U.S. 224 (1945) and *Ex Parte Hudgings*, 249 U.S. 370 (1919)). In order to establish such "misbehavior" the prosecution must prove, beyond a reasonable doubt, that the relevant statement meets "the essential elements of perjury under the general law," that is, the declarant "made a false statement that he did not, at the time, believe to be true" and "that the statement is material to the issue to be determined by the Court." *Id.* at 27-28 (citing authorities). However, so-called "fraud by omission," on which Plaintiff seeks to rely in part, see Tr. at 5, 11-12, is not sufficient to prove perjury. *See id.* at 28 ("it is firmly established that a statement that is literally true may

not form the basis for a perjury prosecution – even if the statement is incomplete, intentionally misleading or 'misleading by negative implication'") (quoting *Bronston v. United States*, 409 U.S. 353, 359-60 (1973)).

In addition to perjury, the "other elements" that must be proven beyond a reasonable doubt to justify a conviction under 18 U.S.C. § 401(1) are that the false statement (i) occurred in or near the presence of the court, (ii) obstructed the administration of justice, and (iii) was committed with the requisite degree of criminal intent. *Id.* at 27 (citing *United States v. McGainey*, 37 F.3d 682, 684 (D.C. Cir. 1994)).[3] Each of those elements has substantive significance and may not be ignored or skipped over. *See, e.g., In re Michael*, 326 U.S. 224, 228 (1945) ("perjury alone does not constitute an 'obstruction' . . . and the further element of obstruction to the Court in the performance of its duty" is necessary for criminal contempt) (internal quote omitted); *Ney v. United States*, 313 U.S. 33, 48-49 (1941) ("in or near the presence of the court" must "be construed as geographical terms" and not read with a "causal connotation" relating "to the work of the court").

Plaintiff contends that Eric Wachter "lied" in his December 19, 2012 declaration that was submitted in opposition to Plaintiff's motion for a preliminary injunction. According to Plaintiff, "what Mr. Wachter said is, we've issued a litigation hold. We are adhering to that litigation hold. We will do every action necessary to preserve documents. You do not need to issue this

[3] The criminal contempt statute has three distinct subsections. Subsection (2) cannot be applicable here because Plaintiff's allegations involve no "official transaction" by a court "officer" within the meaning of that subsection. *See Cammer v. United States*, 350 U.S. 399, 405-08 (1956). Subsection (3) is likewise inapplicable because Plaintiff's allegations do not involve any "disobedience or resistance" to the Court's "lawful writ, process, order, rule, decree, or command." Therefore, as an *In re Grand Jury Proceedings*, any criminal prosecution for an alleged false statement in this case would have to be brought pursuant to 18 U.S.C. § 401(1).

preliminary injunction." Tr. at 8-9. The relevant portion of Mr. Wachter's declaration in fact states:

> On October 23, 2012, certain EPA staff, including OEX staff, was sent a litigation hold notice issued by an Attorney-Advisor in EPA's Office of General Counsel, advising that all information responsive to this FOIA request must be preserved. The hold notice was sent through the Encase Litigation Hold Module, which is the electronic tool that EPA now uses to issue all litigation holds. I certified that I read and understood the meaning and scope of the litigation hold notice, and that I will comply to the best of my ability with the EPA's obligation to preserve information relevant to this FOIA litigation. My staff has been instructed to comply with all preservation obligations for relevant information concerning this FOIA request and FOIA litigation.
>
> My staff and I are also aware of our obligations to preserve records under the Federal Records Act as well as the obligation to preserve information that is responsive to a FOIA request. Additionally, my staff and I are familiar with and understand EPA's Interim Policy, "Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds."

Declaration of Eric Wachter [ECF Doc. 16-1], ¶¶ 15-16 at p. 6 (Dec. 19, 2012). Thus, Plaintiff's counsel significantly overstated and mischaracterized this declaration. Plaintiff has presented no evidence that Mr. Wachter falsely represented that he had read and understood the litigation hold notice, "will comply to the best of my ability" with EPA's document preservation obligations, and that his staff "has been instructed to comply" with those preservation obligations, which is all that Mr. Wachter actually said.

Plaintiff also alleges that the Defendant is responsible for a "knowing and intentional falsehood" by deliberately excluding the Administrator and Deputy Administrator from the initial search for responsive records. Tr. at 5; *see id.* at 7-8, 11-12, 16-17. As Defendant has previously explained, the Office of the Executive Secretariat (OEX) is the office that is responsible for managing the EPA Administrator's correspondence and records, and was the lead office for processing Plaintiff's FOIA request. *See* Defendant's Opposition to Plaintiff's Motion

for Spoliation Sanctions [ECF Doc. 55] at 26-28. Had Defendant interpreted the narrowed scope of the request to exclude the Administrator and Deputy Administrator, lead responsibility for the request would not have been assigned to OEX. *See id.* at 26-27 (citing testimony describing role of OEX and showing that both Mr. Wachter and the FOIA Coordinator for the Office of the Administrator, from the very start, interpreted Plaintiff's FOIA request to include the Administrator, Deputy Administrator, and Chief of Staff). The communications to offices outside the Immediate Office of the Office of the Administrator regarding the need to conduct a search in response to Plaintiff's FOIA request establish nothing more than that OEX had the lead responsibility for processing the request and, in that capacity, communicated with other EPA program offices about how those offices should search for responsive documents. *See id.*at 27-28 (addressing internal instructions sent by FOIA coordinator for the Office of the Administrator to other EPA program offices).

Plaintiff further claims that Mr. Wachter "could not have lawfully and appropriately signed the declaration that said: My office has carefully reviewed it and we got everything we needed from the immediate office of the administrator" *Id.* at 70. Again, however, Plaintiff's counsel did not accurately recount the actual content of Mr. Wachter's declarations. In particular, the two declarations by Mr. Wachter that Defendant submitted in support of its motion for summary judgment each state:

> [t]he initial document collection was closed on January 25, 2013. At that point my office had either received a no-records response or had coordinated the collection of documents from the immediate office of the Office of the Administrator, and from Assistant Administrators, Deputy Assistant Administrators, and Chief of Staff in EPA's Office of Water (OW), Office of Air and Radiation (OAR), Office of Solid Waste and Emergency Response (OSWER), Office of Chemical Safety and Pollution Prevention (OSCPP), Office of Enforcement and Compliance Assurance (OCEA), and Office of General

> Counsel, as well as documents from the associate administrator and deputy associate administrator in EPA's Office of Policy.

Declaration of Eric E. Wachter [ECF Doc. 30-1], ¶ 15 at p. 7 (May 15, 2013); *accord*, Supplemental Declaration of Eric E. Wachter [ECF Doc. 35-7], ¶ 18 at pp. 8-9 (July 24, 2013).

In a similar vein, Plaintiff also parses the word "another" in those declarations to claim that Mr. Wachter "lied" about the initial search for the Deputy Administrator. *See* Tr. at 68, 70. The sentence in question appears verbatim in nearly identical paragraphs in each of Mr. Wachter's two 2013 declarations. Specifically, Mr. Wachter's May declaration states:

> In the course of finalizing the materials for this April 30, 2013, deadline, my office determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient. In the interest of a complete and adequate response to Plaintiff's request, the EPA determined that **another** search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The EPA immediately notified plaintiff and the Court of this deficiency and that there would be a number of additional documents that may potentially be responsive to the Plaintiff's request.

ECF Doc. 30-1, ¶ 19 at p. 8 (emphasis added). Mr. Wachter's July declaration similarly states:

> *The EPA's Supplemental Search for and Collection of Potentially Responsive Records from the Immediate Office of the Office of the Administrator.* As part of finalizing the documents for the Court's April 30, 2013, filing deadline, my office carefully reviewed the document search that was performed between October 23, 2012, and January 25, 2013. In the course of this review, on April 29, 2013, my office determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient. In the interest of a complete and adequate response to Plaintiff's request, the EPA determined that **another** search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The EPA immediately notified plaintiff and the Court of this deficiency and that there would be a number of additional documents that may be potentially responsive to the Plaintiff's request.

ECF Doc. 35-7, ¶ 21 at p. 10 (emphasis added).

Defendant's initial search did include the Administrator and the Deputy Administrator. *See* ECF Doc. 55-4 ("no records" response from Aaron Dickerson after initial search conducted for Administrator); ECF Doc. 55-9 (Declaration of Nena Shaw describing initial search conducted for Deputy Administrator). However, Defendant has no evidence that the EPA Chief of Staff -- the third component of the Immediate Office of the Office of the Administrator -- was included in the initial search. Although Defendant denies that Mr. Wachter or any other EPA employee or counsel has ever intentionally acted to deceive the Court about the extent of the initial search, Defendant acknowledges that the portions of Mr. Wachter's 2013 declarations quoted above can be read to imply – incorrectly -- that the Chief of Staff was included in that search.[4] When considered in its full context, however, Mr. Wachter's statements do not have the sinister character that Plaintiff ascribes to them, and are certainly not probable cause to launch a full-blown criminal prosecution. At worst, Mr. Wachter's statements carry the hallmarks of quotidian imprecision, not the stuff from which criminal convictions are made.

Contrary to Plaintiff's counsel's assertion, *see* Tr. at 70, Mr. Wachter did not affirm that "we got everything we needed" from the Immediate Office of the Office of the Administrator as a result of Defendant's initial search. Rather, Mr. Wachter stated merely that his office had either received a "no records" response or had "coordinated" the collection of responsive records from multiple agency components, including "from the immediate office of the Office of the Administrator." Although the initial search did not include the Chief of Staff, Mr. Wachter's statement is literally true because searches were conducted in two components of the Immediate Office of the Office of the Administrator (i.e., the Administrator and Deputy Administrator).

[4] In light of the erroneous inference that could be made from Mr. Wachter's 2013 declarations, Defendant has withdrawn those declarations simultaneously herewith, and will not subsequently rely on them in this action.

More important, however, is the fact that Defendant has never claimed that its search of the Immediate Office of the Office of the Administrator was sufficient, and has never relied on the ineffectual search conducted for the Administrator and the Deputy Administrator to justify, excuse, or claim credit for the initial search. Indeed, the discussion about Defendant's initial search in Mr. Wachter's 2013 declarations constitutes an admission of error: *i.e.*, that Defendant's initial search was insufficient and that a further search was needed. Analogous admissions of error in other FOIA cases have been treated as indications of an agency's good faith, not as evidence of bad faith. *See, e.g.*, *Maynard v. CIA*, 986 F.2d 547, 564-65 (1st Cir. 1993); *Miller v. Dep't of State*, 779 F.2d 1378, 1386 (8th Cir. 1985); *Perry v. Block*, 684 F.2d 121, 129 (D.C. Cir. 1982); *Goland v. CIA*, 607 F.2d 339, 367, 370 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *Sheffield v. Holder*, 951 F. Supp. 2d 98, 102 (D.D.C. 2013). The same conclusion is warranted here.

Mr. Wachter's declarations explain that Defendant came to realize that the initial search may not have been sufficient to provide a "complete and adequate response" to Plaintiff's FOIA request, and then Defendant took steps to remedy the deficiency. In particular, during processing of potentially responsive records after the initial search, it appeared that additional potentially responsive records had been overlooked. Despite Plaintiff's emphasis on its own definition of a "search" under the FOIA, *see* Tr. at 13, 66-67, it scarcely matters whether those records were overlooked by a failure to search or by a failure to search more thoroughly. Moreover, there would be no point in lying about the parameters of the deficient initial search in connection with a motion for summary judgment based on the subsequent, expanded search that Defendant

undertook in an attempt to rectify the initial search's shortcomings, which is the context in which Mr. Wachter's 2013 declarations were prepared and filed. [5]

Once Defendant recognized that its initial search may have been deficient, Defendant did in fact conduct another search and produced hundreds of pages of additional records. Defendant subsequently undertook yet another search based on 72 search strings negotiated with Plaintiff. *See* R. 55-1 (letter describing search parameters). This sequence of events is indicative of a good faith attempt to respond appropriately to a vague and broadly framed FOIA request, not contempt of the Court's authority. Therefore, the sufficiency of Defendant's ultimate response to Plaintiff's FOIA request should be the focus of the Court's inquiry, and Plaintiff's misguided effort to transform this civil action into a criminal prosecution should be rejected. *See Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) ("As we have noted, however fitful or delayed the release of information under the FOIA may be . . . if we are convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.") (internal quotation omitted; ellipsis in original).

Respectfully submitted,

RONALD C. MACHEN JR. D.C. BAR # 447889
United States Attorney

[5] Plaintiff claims that Defendant "failed to disclose a material fact" in seeking an extension of time to file its motion for summary judgment. Specifically, Plaintiff argues that the material undisclosed fact "was that no search of the deputy administrator's file had ever been made." Tr. at 5. Defendant's motion stated that "in the process of finalizing the pleadings, EPA determined that another search is required and that there are a number of documents that may potentially be responsive to Plaintiff's request, which have not yet been reviewed by the agency." ECF Doc. 27. This statement was entirely accurate, made no express or implied characterization about the scope of Defendant's initial search, and did not omit any material fact. The point of the extension request was that a further search was needed because responsive records had been overlooked. Defendant could not proceed with a summary judgment motion in those circumstances.

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